Supreme Court, U.S.
FILED

09-816 DEC 15 2009

OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE
UNITED STATES

CYNTHIA COLLIE HOLMES, M.D.,

Petitioner,

v.

RICHARD L. DUNCAN, MEREDITH
BOND, SIDNEY GILREATH, AND
GILREATH & ASSOCIATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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QUESTIONS PRESENTED

I. **Was Petitioner, who was a Plaintiff in a civil lawsuit in Tennessee State Court, denied due process when the Court dismissed causes of action from the Complaint Sua Sponte, without notice to either party?**

II. **Was the Petitioner, who was a Plaintiff in a civil lawsuit in Tennessee State Court, denied due process when the Court issued an Order before Plaintiff had received notice and an opportunity to respond to Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment?**

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Rules

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OPINIONS BELOW

The complaint herein was timely filed and served. Defendants filed a Motion for Summary Judgment on February 28, 2006, which was heard by the Trial Court on September 15, 2006, and granted. The Order granting the summary judgment was filed on November 3, 2006. The Petitioner, Dr. Holmes, timely served and filed a post-judgment motion to alter or amend which was heard on December 21, 2006. By order filed on January 12, 2007, the post-judgment motion to alter or amend was denied. Petitioner filed a notice of appeal. The Tennessee Appellate Court affirmed the Trial Court's decision in an Opinion dated April 10, 2008 Petitioner filed a request for review to the Tennessee State Supreme Court, which was denied on September 28, 2009.

JURISDICTION

On September 28, 2009, the Tennessee Supreme Court denied Petitioner's request for review of the Tennessee Appellate Court Opinion affirming the Trial Court's Order granting Summary Judgment in this case. Petitioner's arguments clearly are based on a claim of a denial of procedural due process, including the right to notice and an opportunity to be heard. The Supreme Court has granted jurisdiction to consider clear constitutional violations in cases where, unlike the instant case, the Petitioner never actually raised a constitutional issue in the State Courts. Petitioner has raised issues of procedural due process concerning the dismissal of her State civil suit, which have constitutional implications. When the record in a case has revealed plain error, the Court has enforced federal constitutional standards despite the petitioner's failure to raise clearly

his federal constitutional claim in the court below. See, e.g., Vachon v. New Hampshire, 414 U.S. 478 (1974) (reversing a criminal conviction on the basis of a due process claim neither made in constitutional form to the State Supreme Court nor presented by the appellant in his jurisdiction statement to this Court). Williams v. Florida, 104 S.Ct. 1617, 465 U.S. 1109, 80 L.Ed.2d 146, 52 U.S.L.W. 3686, 1984.SCT.41007 (1984).

CONSTITUTIONAL PROVISIONS AT ISSUE

Amendment XIV.

Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE STATUTORY PROVISIONS AT ISSUE

None

STATEMENT OF THE CASE

The Respondents are attorneys and a firm based in Tennessee, who have some experience in the area of plaintiff's litigation of malfeasance cases. The underlying claims in this action arise from acts of professional malfeasance by the Respondents. The claims included allegations of wrongful solicitation, misrepresentation, and legal malpractice against the Respondents, as well as a cause of action for breach of contract.

The Petitioner, Dr. Holmes, (who had originally filed as a "Jane Doe" Plaintiff) had already filed suit in the underlying case in South Carolina. As a Pro se plaintiff, she had

successfully defeated a Motion for Summary Judgment. Respondents, after reading the 30-page order denying summary judgment, contacted Dr. Holmes and solicited her patronage. Dr. Holmes and the Respondents entered into a contingency fee agreement to provide legal representation at the impending jury trial of Dr. Holmes' case in South Carolina. The Respondents petitioned for admission pro hac vice to the South Carolina Bar, misrepresenting to the Court that none of them had been subject to any disciplinary proceedings, and were admitted. Respondents failed to provide a written contingency agreement despite Dr. Holmes' requests (a violation of the South Carolina Rules of Professional Conduct). Dr. Holmes, as the case progressed, provided more than $15,000.00 to the Respondents and otherwise satisfied the contract, however, Defendants breached the contract and fiduciary duty to Dr. Holmes without just cause, resulting in

substantial harm to Dr. Holmes.

Dr. Holmes' suit against the Respondents was filed in Tennessee, in Knox County. As the case progressed, the Respondents filed a motion for Summary Judgment. Dr. Holmes filed a response. One day before the hearing date, Respondents mailed a reply to Dr. Holmes' out-of-stat address. The reply raised new issues and arguments. The Court granted Summary Judgment, a decision which was based largely, if not entirely, upon the arguments first set forth in the un-served reply and without giving Dr. Holmes a meaningful opportunity to respond to the new arguments. The Court also, sua sponte, dismissed causes of action set forth in the complaint, which were not addressed in the Respondents' motion for summary judgment, thus denying Dr. Holmes any notice or opportunity to respond to the sua sponte action. When Dr. Holmes requested that the

Court comply with Rule 56 of the Tennessee Rules of Civil Procedure, by setting forth the basis for its decision, the Judge refused and replied that he did not care what the appellate courts had to say adding, "I know I'm right because I've tried more cases than they have."

Dr. Holmes appealed the Trial Court's Order, raising issues of procedural due process regarding the lack of notice and opportunity to be heard. The Appeal was unsuccessful. She then petitioned the Tennessee Supreme Court for review, which was denied.

REASONS FOR GRANTING THE *WRIT OF CERTIORARI*

THE COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DETERMINE WHETHER PETITIONER WAS DENIED DUE PROCESS BY THE TENNESSEE COURTS WHEN SHE WAS SUBJECT TO THE DISMISSAL OF CIVIL CLAIMS UPON A SUA SPONTE MOTION BY THE COURT, ON SUMMARY JUDGMENT, WITHOUT PRIOR NOTICE OR AN OPPORTUNITY TO BE HEARD ON THE ISSUES.

THE COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DETERMINE WHETHER PETITIONER WAS DENIED DUE PROCESS BY TENNESSEE STATE COURTS WHEN THE COURT ISSUED AN ORDER GRANTING SUMMARY JUDGMENT BEFORE THE PLAINTIFF WAS AFFORDED AN OPPORTUNITY TO RESPOND TO THE MOVING PARTY'S REPLY, WHICH RAISED ADDITIONAL ARGUMENTS RELIED UPON BY THE COURT.

I. The dismissal of a Plaintiff's Civil Complaint, upon a sua sponte motion, is a deprivation of property by the State, which should call for constitutional review for procedural due process.

When a State Court takes action, Sua Sponte, on a motion for Summary Judgment in a civil action, it is taking State action to affect the property rights of a citizen. Where the action was purely Sua Sponte, this invokes the same issues of constitutional procedural due process as would a taking or the imposition of a criminal or civil monetary fine by the State.

A. Action taken by a Court upon a Sua Sponte motion is State action.

A Sua Sponte motion is a motion which is begun and pursued by the Court, upon its own initiative, without action by a party. Because a Sua Sponte motion, in a civil case,

is initiated and carried out solely upon the motion of the State (represented by the Trial Court) and on the State's behalf, it amounts to State action.

B. The granting of Summary Judgment against a party in a Civil matter, where damages are sought, amounts to a taking of property by the State, which invokes Constitutional Due Process considerations.

It should be recognized, by the Court, that the undertaking of a civil lawsuit before the State Courts, whether one is the Plaintiff or the Defendant, is an expensive venture, an investment of money and effort towards an expected outcome. Defendant does not have the right to proceed in pauperis, and the Plaintiff, of course, is subject to court costs, not to mention the costs of litigation. A civil suit, therefore, represents a property interest, both for the Plaintiff, investing money and effort in an attempt to vindicate a right, and for the Defendant, who is spending money to

avoid having to pay a judgment sought by the Plaintiff.

Summary Judgment, pursuant to Rule 56 of the Rules of Civil Procedure in any jurisdiction, is a dispositive action through which one party is deprived of the right to a jury trial, and judgment is granted by the State (by the Court). Where Judgment is granted against the Plaintiff, the Plaintiff loses his or her investment in the case and the value of any potential judgment, as well as continued access to the court system. Where the Defendant is affected by Summary Judgment, she may be subjected to a monetary judgment. This is the deprivation of a property interest. Where the Court files a Rule 56 motion upon a Sua Sponte motion, of its own initiative, it amounts to a potential taking by the government. In such a case, the party against whom the motion is directed should be entitled to constitutional protections of procedural due process.

C. The granting of a motion for Summary Judgment, which was initiated sua sponte, and considered without proper notice to the parties or an opportunity for the affected party to respond is considered reversible for a lack of procedural due process.

Federal Rule of Civil Procedure 56 sets forth the procedures and standard for the grant of summary judgment. Rule 56(c) requires a minimum of ten days notice to the nonmoving party to afford that party an opportunity to oppose the entry of summary judgment.

District courts may grant summary judgment sua sponte in appropriate circumstances. However, a district court may not generally grant summary judgment sua sponte unless it gives prior notice and an opportunity to oppose summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) ("[D]istrict courts are widely acknowledged to possess the power to enter summary

judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence.")

Although Rule 56 and the *Celotex v. Cartrett* opinion refer to federal rules, the basis of the rule and the decision are clear. A Court may not take action to dismiss a claim on summary judgment, sua sponte, without prior notice to the affected parties and affording an opportunity to respond. This principal reflects the basic constitutional right to procedural due process.

II. The Tennessee Courts denied the Petitioner, Dr. Holmes, constitutional procedural due process by initiating and carrying out a motion for Summary Judgment against her claims in this case without notice or an opportunity for her to present evidence and be heard on the matter.

In the absence of extraordinary circumstances, procedural due process requires notice and an opportunity to be heard before any governmental deprivation of

a property interest. Boddie v. Connecticut, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971). The form which those procedural protections must take is determined by an evaluation of all the circumstances and an accommodation of competing interests. See Goss v. Lopez, 419 U.S. 565, 579, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975). The individual's right to fairness and accuracy must be respected, as must the court's need to act quickly and decisively.

In this case, the Tennessee Trial Court was entertaining a motion for summary judgment on some but not all of the claims made by Dr. Holmes in the civil suit against the Defendants. The Trial Court granted the Summary Judgment motion under circumstances which, in and of themselves, violated Tennessee Rules. It also, Sua Sponte, dismissed the remaining claims from Dr. Holmes' lawsuit. The Court did not give any notice of its sua sponte motion. There was no

chance to present evidence, or to be heard on the matter regarding causes of action which had not been addressed by the Defendant's reply. The right to present evidence is a fundamental due process right. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). The dismissal of the civil suit resulted in a loss of property in the form of the money invested in the case, some of which was paid directly to the State as court costs. The Court's one-sided action, dismissing the remaining claims in Dr. Holmes' case, sua sponte, was a taking by State action, which was carried out without

affording the protections of constitutional due process.

III. The Tennessee Court's actions in dismissing the Petitioner's Civil Suit via a sua sponte Summary Judgment motion show a knowing disregard for Due Process and a willful disregard for procedures designed to afford procedural due process.

The Tennessee Courts are governed by rules which are designed to safeguard a citizen's right to procedural due process in the setting of a summary judgment motion. First, Rule 5.03 of the Tennessee Rules of Civil Procedure prohibits the Court from making a final decision on a motion until the parties have received notice of the motion. This is clearly a form of protection for constitutional due process.

Tenn. R. Civ. P. Rule 56.04 and Harris v. Chern, 335 S.W.3d 741, 746 (Tenn.2000), call for the Court to give a statement of the "legal grounds upon which the court grants

the motion" when summary judgment is granted. This rule was clearly promulgated to afford the parties an opportunity to be able to file a notice of appeal, and to identify relevant issues, so that they could be preserved for appeal. Denying a party a recitation of the legal basis for a decision is tantamount to denying the party's right to effectively appeal, and therefore, denying the party's right to present evidence on an issue of deprivation of property rights, as well.

In this case, the Trial Court Judge denied the Petitioner the right to notice and the opportunity to present evidence when he made a decision before the Petitioner had been served with the reply brief. The Reply brief asserted issues and arguments which had not been addressed in the initial motion for summary judgment. The Court's Order, dismissing the Petitioner's claims, was based upon argument first raised in the unserved reply. The Petitioner was denied the

right to a meaningful opportunity to respond.

Evidence of the Court's willfulness in disregarding constitutional due process guarantees came from the words of the Judge himself. Pursuant to TRCP 56.04, the circuit court was asked to give the legal basis for the decision. In response, the Court disavowed binding precedent and cast dispersions on the Appellate Courts, stating that he did not care what the appellate courts had to say, adding "I know I'm right because I've tried more cases than they have."

Rules designed to afford a party entering the Courts in this country procedural due process need not require onerous effort on the part of the state. The requirements for constitutional due process are simple, and of such a basic nature that the States are afforded great latitude in their application. Constitutional due process requires notice, a meaningful opportunity to

be heard or present evidence, and an impartial decision maker. In this case, the circuit court failed each element of fundamental due process. In addition to the injury, the Circuit Court added the insult of comments making it clear that the failure to afford due process was intentional. The Supreme Court should intervene on behalf of the injured party, making good on the constitutional guarantees of notice, a meaningful opportunity to be heard and an impartial decision maker, promises that this nation makes to each and every citizen through the Constitution, promises which are constitutional mandates, especially when the defendants are "officers of the court."

CONCLUSION

For the reasons set forth above, Petitioner respectfully prays that the Court grant a *Writ of Certiorari to review* the Judgment of the Supreme Court of Tennessee in this case.

Respectfully Submitted,

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Counsel for the Petitioner

No.

IN THE SUPREME COURT OF THE UNITED STATES

CYNTHIA COLLIE HOLMES, M.D.,

Petitioner,

v.

RICHARD L. DUNCAN, MEREDITH BOND, SIDNEY GILREATH, AND GILREATH & ASSOCIATES,

Respondent.

APPENDIX

Rule 14(i)

Rule 14 (i)(i) Opinions, Orders, Findings of fact and conclusions of law entered in conjunction with the judgment sought to be reviewed

Order of Knox County Circuit Court, Tennessee
November 3, 2006. 1

Order from Circuit Court, Knox County, Tennessee
January 10, 2007 10

Opinion from the Court of Appeals of Tennessee
April 10, 2008 13

Order Denying Petition for Rule 11 Review - Tennessee Supreme Court
September 28, 2009 32

Denial of motion for Reconsideration, Tennessee State Supreme Court
Date, October 20, 2009 33

Order of Knox County Circuit Court, Tennessee

November 3, 2006

STATE OF TENNESSEE
IN THE CIRCUIT COURT OF KNOX, TENNESSEE

J. Doe (Cynthia Holmes)	)
	)
Plaintiff,	)case No. 3-58605
	)
Richard L. Duncan, Meridith Bond, Sidney Gilreath and Gilreath & Associates,	)
	)
Defendants.	)

ORDER SUSTAINING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Came the parties before the Court for Hearing on the Motion For Summary Judgment filed by the defendants. After having heard argument from the Plaintiff and Counsel for the Defendants and after having considered the entire record, it is the opinion of the court that the Motion as to all defendants is well taken and should be sustained.

Incorporated into this Order is the

opinion of the Court as set forth on pages 36 through 40 of the transcript of the Hearing of September 15, 2006, copies of which are attached to this Order together with the title page, page 1, and the Certificate, page 41.

It is accordingly ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment be, and is hereby, sustained and this cause is dismissed with the costs taxed to the Plaintiff.

ENTER: This 3rd day of November, 2006.

_____
CIRCUIT JUDGE

APPROVED FOR ENTRY

Cynthia Holmes P.O. Box 187 Sullivans Island SC 29482-0187	Stephen C. Daves (BPR #000908) Attorney for Sidney Gilreath O'Neil, Parker & Williamson, PLLC Knoxville, TN

MOTION FOR SUMMARY JUDGMENT BEFORE THE HONORABLE WHEELER A. ROSENBALM

September 15, 2006

IN THE CIRCUIT COURT FOR KNOX COUNTY, TENNESSEE

J. DOE, Plaintiff	) Case No. 3-58605
Vs.	)
RICHARD L. DUNCAN,	)
MERIDITH BOND	)
SIDNEY GILREATH, and	)
GILREATH & ASSOCIATES	)
Defendants	)

APPEARANCES:

FOR THE PLAINTIFF:

C. HOLMES, ESQ.
Post Office Box 187
Sullivan's Island, South Carolina
29482-0187

FOR THE DEFENDANTS:
STEPHEN C. DAVES, ESQ.
Attorney at Law
O'NEIL, PARKER & WILLIAMSON
416 Cumberland Avenue, S.W.
Post Office Box 214
Knoxville, Tennessee 37901

(Whereupon, the following proceedings were held before the Honorable Weeler A. Rosenbalm, as follows)

MR. DAVES: Your Honor, here fore Defendants

THE COURT: All right. As earlier indicated, the Court has concluded that the Plaintiff's motion to strike the Defendants' motions for summary judgment is not well taken, and it is respectfully overruled and disallowed.

And the Court consequently has now dealt with the motions for summary judgment filed by the respective Defendants in this case and has again reviewed the affidavit and other matters in the record that this lawsuit, which is styled J. Doe versus Richard Duncan, et al, should have been styled C. Holmes versus Duncan and others, there

being no authority in this state to permit this Plaintiff to proceed anonymously in this case, and the Court expressly disapproves of such a process.

Now, getting to the substance of the motions for Summary Judgment in this cause, it appears that Defendant Sidney Gilreath has filed a motion which -- an affidavit which unequivocally says that he had no correspondence or connection with the Plaintiff, Mrs. Holmes, in this case and that he did not represent her. The Plaintiff in her affidavit does not make an issue of fact with respect to whether Mr. Gilreath represented her in this case, and consequently the Court is constrained to conclude that the motion for summary judgment filed by Sidney Gilreath should be and respectfully is sustained.

Both Mr. Duncan and Mr. Bond take the position that in their representation of the Plaintiff in this case in a lawsuit which ultimately was settled, that they exercised

the standard of care appropriate for trial counsel in the handling of such lawsuits, and their affidavits state expressly and without equivocation that they complied in all respects with the applicable standard of care and that the Plaintiff suffered no loss as a result of the alleged violation or deviation from the standard of legal care required of the Defendants in their counsel and representation of this Plaintiff. Likewise, those contentions set forth in the affidavits or sworn testimony of Mr. Duncan and Mr. Bond are not directly refuted by the Plaintiff.

It is the opinion of the Court that while they may be meager in terms, the affidavits of Mr. Bond and Mr. Duncan are sufficient to negate essential elements of the Plaintiff's legal malpractice cause of action, and before she can continue with this case, it was incumbent upon her to go forward or proceed with competent evidence showing that there was a violation of the legal standard of care

and there she suffered a loss as a consequence thereof. The only evidence offered by the Plaintiff in support of her position in this regard is her affidavit that was filed with the Court on September 8th, 2006.

The Court has studied with care again that affidavit and finds it woefully inadequate to raise any legitimate, genuine and material issue of fact with respect to the alleged malpractice of these Defendants then, so I am constrained to conclude, based upon what is before me, that the motions most respectfully are sustained. The case will be dismissed at the cost of Plaintiff and her assurety.

And you'll please prepare the appropriate order, Mr. Daves.

MR. DAVES: I will, your honor. And with your permission, I'll incorporate your opinion from the bench in that order.

THE COURT: Do that.

MS. HOLMES: Your Honor, there was a breach of contract cause of -- there were

multiple causes of action, breach of contract as well as that cause of action. The other cause of action -- causes of action I would request go forward.

MR. DAVES: Well, Your Honor, I think all that's subsumed into the entirety of what she's asserted as malpractice.

THE COURT: I think so. I sustained the motions for summary judgment. Case dismissed.

MR. DAVES: Thank you, Your Honor.

MS. HOLMES: Your Honor, for the record, I would just like to --

THE COURT: I'm Sorry?

MS. HOLMES: For the record, I would just like to mention, state my objection. I would like to --

THE COURT: Sure.

MS. HOLMES: I would just like to object for the record and also note that I plan to appeal and ---

THE COURT: Certainly you have that

prerogative.

MS. HOLMES: And I would --

THE COURT: You may take any further action that is appropriate under the law of this state--

MS. HOLMES: Yes, sir.

THE COURT: -- without any offense to me at all.

MS. HOLMES: Thank you for hearing this today, and I just wanted to make any -- whatever needs to be done on the record to object, just to make that clear. Thank you.

(End of Proceedings.)

Order from Circuit Court, Knox County, Tennessee

January 10, 2007

STATE OF TENNESSEE
IN THE CIRCUIT COURT OF KNOX, TENNESSEE

J. Doe (Cynthia Holmes)	)
	)
Plaintiff,	)case No. 3-58605
	)
Richard L. Duncan, Meridith Bond, Sidney Gilreath and Gilreath & Associates,	)
	)
Defendants.	)

ORDER OVERRULING PLAINTIFF'S "NOTICE OF MOTION AND RULE 52.02 (TRCP) MOTION, NOTICE OF MOTION AND AMENDED RULE 59.02 (TRCP) MOTION AND NOTICE OF MOTION AND AMENDED RULE 59.04 (TRCP) MOTION

Came the parties before the Court for a Hearing on the Plaintiff's "NOTICE OF MOTION AND RULE 52.02 (TRCP), NOTICE OF MOTION AND AMENDED RULE 59.02 (TRCP) MOTION AND NOTICE OF MOTION AND AMENDED RULE 59.04

(TRCP) MOTION" filed by Plaintiff. After having heard argument from the plaintiff and Counsel for the Defendants and after having considered the entire record, it is the opinion of the court that the Motions shall be overruled on the following grounds:

1. That the "Motions" fail to comply with TRCP 7;

2. That TRCP 52.02 is not applicable to rulings on Motions for Summary Judgment;

3. That the Affidavits and response submitted in support of the Plaintiff's present Motion were due prior to the argument of the original Motion for Summary Judgment that was held on September 15, 2006 and , accordingly, are not timely filed for consideration or reconsideration of the Motion for Summary Judgment which was sustained by Order entered on November 3, 2006;

4. That regardless of any of the above, and in the alternative, the Court reviewed the affidavits and they are not sufficient to create

a genuine issue of material fact on the issued joined in the Original Motion for Summary Judgment.

It is accordingly ORDERED, ADJUDGED AND DECREED that the Plaintiff's "NOTICE OF MOTION AND RULE 52.02 (TRCP), NOTICE OF MOTION AND AMENDED RULE 59.02 (TRCP) MOTION AND AMENDED RULE 59.04 (TRCP) MOTION" are hereby overruled and this cause is dismissed with the costs taxed to the Plaintiff.

The clerk shall mail a copy of the entered judgment to the Plaintiff and counsel for the Defendants within five days after entry. ENTER: This 10th day of January, 2007

_____
CIRCUIT JUDGE

APPROVED FOR ENTRY
O'NEIL, PARKER & WILLIAMSON, PLLC
BY: _____
Stephen C. Daves (BPR #000908)
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Knoxville, TN 37901

Opinion from the Court of
Appeals of Tennessee

April 10, 2008

IN THE COURT OF APPEALS OF
TENNESSEE
AT NASHVILLE
April 10, 2008 Session
J. DOE v. RICHARD L. DUNCAN, ET AL.
Appeal from the Circuit Court for Knox
County
No. 3-586-05 Wheeler A. Rosenbalm, Judge
No. E2006-02506-COA-R3-CV - FILED
SEPTEMBER 18, 2008

Since plaintiff in this legal malpractice case failed to refute defendants' affidavits that they were familiar with and complied with the applicable standard of care and that plaintiff was not injured by any violation of the standard, the trial court correctly granted defendants' motion for summary judgment. The trial court did not abuse its discretion in failing to revise its order based on affidavits filed after the final order since plaintiff gave no explanation why the affidavits should be

considered and since the affidavits did not create a genuine issue of material fact as to whether the defendants committed legal malpractice or injured plaintiff.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Dr. Cynthia Holmes, Sullivans Isd., South Carolina, Pro Se.

Stephen C. Daves, for the appellees, Richard L. Duncan, Meridith Bond, Sidney Gilreath and Gilreath & Associates.

OPINION

The plaintiff, Dr. Cynthia Holmes,1 filed suit against Richard Duncan, Meridith Boyd, Sidney Gilreath and their firm, Gilreath & Associates, for legal malpractice in October of 2005. Mr. Duncan and Mr. Boyd had

previously represented Dr. Holmes in an action in South Carolina against a hospital. Plaintiff includes a laundry list of other claims, which like the claims discussed above, are basically encompassed in the malpractice claim, such as unfair trade practices, civil conspiracy, promissory estoppel, conversion and inadequate supervision of Mr. Duncan and Mr. Bond by Mr. Gilreath.

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Dr. Holmes' complaint includes numerous causes of action, yet the essence of all Dr. Holmes' claims is that defendants committed legal malpractice since they were not prepared to proceed to trial which forced her on the eve of trial to agree to a settlement that was not appropriately advantageous to her. Dr. Holmes' alleged injury is the inadequate settlement she asserts was caused by defendants' failure to adequately prepare her case. According to Dr. Holmes, the defendants wrongfully solicited her business

when they "represented themselves as 'trial attorneys' with a collective experience of more than 50 years in trying cases and on par with the 'Ness, Motley law firm.'" Defendants were also alleged to have breached the oral contract between the parties to provide Dr. Holmes legal representation at the trial of her action against the hospital. According to Dr. Holmes, the settlement and defendants' failure to try the case breached their oral agreement. Dr. Holmes alleges the defendants breached the fiduciary duty owed her and engaged in unspecified fraudulent conduct.2 The defendants filed a motion for summary judgment. Mr. Gilreath sought summary judgment on the basis that he did not represent Dr. Holmes in the South Carolina case or elsewhere.

The defendants who represented Dr. Holmes in the South Carolina case, Mr. Duncan and Mr. Bond, also sought summary judgment on the basis that they complied with the

applicable standard of care and that no deviation from the applicable standard injured Dr. Holmes.

In support of their motion, defendants filed the affidavits of Sidney Gilreath, Richard Duncan, and Meridith Bond. The affidavit of Mr. Gilreath stated two determinative facts, namely, that he "never represented" Dr. Holmes in any matter and that defendants Bond and Duncan had 50 years cumulative trial experience and needed no supervision from him. According to the affidavits of Mr. Duncan and Mr. Bond, in November of 2001 they met with Dr. Holmes regarding her case that was already pending against Tenet Health Systems Medical Inc. in South Carolina and later that month they filed a notice of appearance in that matter. Between November 2001 and October 2002, defendants Duncan and Bond took several depositions and conducted other discovery. After negotiations, the parties reached a settlement

which provided Dr. Holmes a confidential monetary recovery, reappointment to courtesy staff at the hospital and the right to apply for a change of status. The settlement was negotiated and effectuated with Dr. Holmes' participation. With regard to the standard of care, both the affidavits of Mr. Duncan and Mr. Bond state that they are familiar with the standard of care for cases such as Dr. Holmes' and contain the following:

It is my opinion to a reasonable degree of legal certainty that both Meridith Bond and Richard Duncan exercised the appropriate standard of care in representing Cynthia Holmes in connection with the litigation entitled *J. Doe v. Tenet Health System Medical, Inc., et al.*, CA 00-CP-10-1888, Charleston County Court of Common

Dr. Holmes also filed a Memorandum In Opposition To The Motion For Summary Judgment that was sworn 3 to by her. Given

that this Memorandum was not an affidavit but contained argument and legal citations, the trial court correctly treated it as pleadings. In any event, the memorandum likewise creates no genuine issue of material fact to rebut defendants' affidavits.

The trial court denied Dr. Holmes' motion to strike and to dismiss defendants' motion for summary judgment.4

Pleas. The appropriate standard of care was exercised by us both in connection with preparation of the case for trial and in settlement negotiations leading to settlement of the case. Within a reasonable degree of legal certainty, it is [our] opinion . . . that . . . [neither parties'] representation . . . caused or contributed to any harm or injury to Cynthia Holmes. In response to defendants' motion, Dr. Holmes filed three of her affidavits. The first two affidavits, in effect, were motions to strike and dismiss the defendants' motion.3

In her third affidavit, Dr. Holmes states that she was licensed to practice law in South Carolina during the period in question and that defendants deviated from the standard of care and such deviation caused her injuries. Other than holding a license in that state, however, Dr. Holmes made no reference to familiarity with the applicable standard of care, that she has ever practiced law, or that she has any experience that would lead one to conclude that she has familiarity with the applicable standard.

Dr. Holmes failed to refute any of the substantive proof presented in defendants' affidavits. The only objections raised by Dr. Holmes to defendants' affidavits were that some referenced attachments were not attached. While it was not necessary to file the referenced materials, defendants then did so.

Also accompanying defendants' motion was a Statement of Undisputed Material Facts

pursuant to Rule 56.03 of the Tennessee Rules of Civil Procedure. The defendants' Statement made specific citations to the record as required by Rule 56.03. The citations were to the defendants' affidavits. Dr. Holmes filed a sworn Response Establishing Disputed Material Facts which failed to either agree that the facts were undisputed or demonstrated that the material facts were disputed as required by Rule 56.03. The Response was sworn to by Dr. Holmes and, in effect, either stated she had no personal knowledge of the facts or provided additional information that was not germane to creating issues of fact which she says defendants failed to disclose.

The trial court held a hearing on the motion on September 15, 2006 wherein the trial court questioned Dr. Holmes closely and explained the significance of her lack of proof on the issue whether Mr. Gilreath was involved at

all and whether Mr. Bond and Mr. Duncan violated the applicable standard of care which in any way that caused her any injury. The trial court granted defendants' motion for summary judgment on November 3, 2006 and incorporated into the order a transcript of its ruling from the bench.4 With regard to Mr. Gilreath, since his affidavit unequivocally states he had no role in Dr. Holmes' representation and that Mr. Bonds and Mr. Duncan needed no supervision, which remained unchallenged by Dr. Holmes, the

trial court granted Mr. Gilreath summary judgment. The trial court likewise granted Mr. Bond and Mr. Duncan summary judgment based on their affidavits that they were familiar with the applicable standard of care and that they complied with the applicable standard of care in preparing her case for trial and in its settlement and that Dr. Holmes suffered no loss from any

deviation of that standard. Although the trial court found that the affidavits by Mr. Bond and Mr. Duncan "may be meager in terms," the trial court found that they were sufficient to negate essential elements of plaintiff's claims such that it was incumbent upon Dr. Holmes to come forward with competent evidence showing a violation of the standard of care and a resultant injury. Since Dr. Holmes came forward with no such proof, the defendants' motion was granted. As to her other claims, the trial court found they were subsumed by the legal malpractice claim and, consequently, Dr. Holmes' lawsuit was dismissed in its entirety against all defendants.

Thereafter on November 14, 2006, Dr. Holmes filed what was styled a "Rule 52 Motion" asking the court to revise its final order of November 3, 2006. In support of her motion, Dr. Holmes subsequently filed three additional affidavits in an effort to alter or

amend the order granting summary judgment. The trial court denied Dr. Holmes' request to amend the order granting summary judgment based upon several grounds. First, the trial court found that Dr. Holmes' reliance on Tenn. R. Civ. P. 52.02 was misplaced since that rule does not apply to motions for summary judgment. Second, Dr. Holmes' "motions" did not comply with Tenn. R. Civ. P. 7. Third, the trial court found the affidavits were not timely since they were filed after the order granting summary judgment was entered. Finally, the trial court found that after reviewing the three affidavits, even if they were considered, the affidavits were insufficient to create genuine issues of material fact. Dr. Holmes appeals the order granting summary judgment.

I. STANDARD OF REVIEW

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *BellSouth Advertising*

& Publishing Co. v. Johnson, 100 S.W.3d 202, 205 (Tenn. 2003); *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281, 285 (Tenn. 2001); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). We review the summary judgment decision as a question of law. *Finister v. Humboldt Gen. Hosp., Inc.*, 970 S.W.2d 435, 437 (Tenn.1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn.1997). Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004); *Staples v. CBL & Assoc.*, 15 S.W.3d 83, 88 (Tenn. 2000). The requirements for the grant of summary judgment are that the filings supporting the motion show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Tenn.

R. Civ. P. 56.04; *Blair*, 130 S.W.3d at 764; *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). Consequently, summary judgment should be granted only when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion - that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Webber v. State Farm*

Mut. Auto. Ins. Co., 49 S.W.3d 265, 269 (Tenn. 2001); *Brown v. Birman Managed Care, Inc.*, 42 S.W.3d 62, 66 (Tenn. 2001); *Staples*, 15 S.W.3d at 88. In our review, we must consider the evidence presented at the summary judgment stage in the light most favorable to the non-moving party, and we must afford that party all reasonable inferences. *Doe v. HCA Health Servs., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001); *Memphis*

Hous. Auth. v. Thompson, 38 S.W.3d 504, 507 (Tenn. 2001). We must determine first whether factual disputes exist and, if so, whether the disputed fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd*, 847 S.W.2d at 214; *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). "[I]f there is a dispute as to any material fact or any doubt as to the conclusions to be drawn from that fact, the motion must be denied." *Byrd*, 847 S.W.2d at 211.

To meet the requirements for summary judgment, a defendant moving for summary judgment must, in its filings supporting the motion, either affirmatively negate an essential element of the nonmoving party's claim or conclusively establish an affirmative defense. *Blair*, 130 S.W.3d at 767; *Staples*, 15 S.W.3d at 88. If the moving party fails to

meet this burden, the burden to come forward with probative evidence establishing the existence of a genuine issue for trial does not shift to the non-moving party, and the motion must be denied. *Staples*, 15 S.W.3d at 88-89. If, however, the moving party successfully negates a claimed basis for the action or establishes an affirmative defense, the non-moving party may not simply rest upon the pleadings. *Staples*, 15 S.W.3d at 89. In that situation, the non-moving party has the burden of pointing out, rehabilitating, or providing new evidence to create a factual dispute as to the material element in dispute. *Staples*, 15 S.W.3d at 89; *Rains v. Bend of the River*, 124 S.W.3d 580, 587-88 (Tenn. Ct. App. 2003).

II. CLAIM AGAINST MR. GILREATH

Mr. Gilreath submitted proof by affidavit that at no time did he represent Dr. Holmes and that given the years of trial experience by Mr. Duncan and Mr. Bond, there was no

requirement or duty that he supervise them. Dr. Holmes at no time offered any proof to refute this either before or after the trial court granted summary judgment. Consequently, summary judgment as to Mr. Gilreath is affirmed.

III. CLAIMS AGAINST MR. DUNCAN AND MR. BOND

The affidavits of Mr. Duncan and Mr. Bond provide proof that they were familiar with and met the applicable standard of care in preparing Dr. Holmes' case for trial and during settlement negotiations. Dr. Holmes submitted no proof whatsoever to refute defendants' familiarity with the applicable standard. Dr. Holmes' third affidavit did state that defendants violated the standard of care; however, the affidavit failed to state that she had any familiarity with the applicable standard.

Consequently, the trial court did not err in

granting summary judgment to the defendants. While plaintiff alleged numerous causes of action, we agree with the trial court that plaintiff's claim is essentially one for legal malpractice, so judgment as to all claims was appropriate.

After the trial court granted summary judgment, Dr. Holmes then asked the court to consider her fourth affidavit and the affidavit of two other South Carolina attorneys on whether the representation by defendants Mr. Duncan and Mr. Bond violated the applicable standard of care. While Dr. Holmes' request was not made appropriately, in effect, Dr. Holmes' request was one under Rule 59.04, asking the court to alter or amend the final order based on additional evidence.

Our Supreme Court has held that when additional evidence is submitted in support of a motion to revise a grant of summary judgment, the court should consider the following factors:

1) the movant's efforts to obtain evidence to respond to the motion for summary judgment;

2) the importance of the newly submitted evidence to the movant's case;

3) the explanation offered by the movant for its failure to offer the newly submitted evidence in its initial response to the motion for summary judgment;

4) the likelihood that the nonmoving party will suffer unfair prejudice; and

5) any other relevant factor.

Stovall v. Clarke, 113 S.W.3d 715, 721 (Tenn. 2003) (standard applied to Rule 59 motion); *Harris v. Chern*, 33 S.W.3d 741, 745 (Tenn. 2000) (standard applied to Rule 54.02 motion); *Pullum v. Robinette*, 174 S.W.3d 124, 141 (Tenn. Ct. App. 2004). The trial court's ruling on a motion to alter or amend will be reversed only for an abuse of discretion. *Stovall*, 113 S.W.3d at 721. While the trial court failed to cite *Stovall* or

Harris or make express reference to the standard enunciated therein, we find no reversible error since the trial court is correct that even if one considers the three affidavits, there is no competent proof introduced to refute either the affidavits of Mr. Duncan and Mr. Bond that they complied with the applicable standard of care or Mr. Gilreath's affidavit that he was not involved. The untimely affidavits provided by Dr. Holmes were from two South Carolina attorneys and Dr. Holmes herself. The affidavit of Desa Ballard, a South Carolina attorney, does not provide an opinion regarding whether defendants violated the standard of care but only points out what she believes are factual disputes between the parties. Ms. Ballard's affidavit expressly states that she does not have sufficient evidence to opine whether the standard of care was breached and whether Dr. Holmes was injured thereby. The affidavit of another attorney, Kevin Holmes, Dr.

Holmes' former husband, likewise expresses no opinion on whether the standard of care was violated but instead relates a sequence of events leading up to the trial. Finally, the plaintiff filed a fourth affidavit stating that, in addition to being a physician, she is also an attorney licensed to practice in South Carolina. However, nowhere in Dr. Holmes' affidavit does she state that she ever practiced law or was familiar with the standard of care required of attorneys in her case, in South Carolina, or in any jurisdiction. Even if raised before the trial court, we do not find that these alleged errors affected the summary judgment.5

There is no dispute that whether the defendants violated the standard of care in representing Dr. Holmes in 6 the South Carolina lawsuit is governed by South Carolina law.

Even though the affidavits were offered by

Dr. Holmes after the final order and without explanation why the trial court should consider them, nevertheless, the trial court did so. Clearly, the trial court gave this *pro se* litigant, who is also an attorney, every opportunity to present genuine issues of material fact about the defendants' alleged legal malpractice which she was unable to do. Dr. Holmes raises several issues on appeal that she did not appear to bring to the attention of the trial court either before or after the trial court granted defendants' motion. These issues include inadequate opportunity to conduct discovery, applicability of South Carolina law, and the assertion that summary judgment was not providently granted because she did not timely receive defendants' reply to her response to their motion.5 Additionally, for the first time on appeal, Dr. Holmes appears to challenge the affidavits of Mr. Bond and Mr. Duncan on the ground that they are

not licensed to practice law in South Carolina.6 The Supreme Court in South Carolina has decided this issue and held licensure is not required to give an expert legal opinion since "professional interaction with practitioners of that specialty are facts sufficient to support his qualification as an expert." *Smith, Haynsworth, McKay & Geurard*, 472 S.W.2d 612, 614 (S.C. 1996). On appeal, Dr. Holmes also faintly appears to take issue with the fact that defendants' affidavits do not expressly state that they are familiar with the standard of care in South Carolina. Failure to raise an issue in the trial court precludes our consideration of it on appeal. Our courts have consistently taken the view that "issues not raised in the trial court cannot be raised for the first time on appeal." *Correll v. E.I. DuPont de Nemours & Co.*, 207 S.W.3d 751, 757 (Tenn. 2006) (citing *Simpson*

v. Frontier Community Credit Union, 810 S.W.2d 147, 153 (Tenn. 1991)); *Barnes v. Barnes*, 193 S.W.3d 495, 501 (Tenn. 2006); *Norton v. McCaskill*, 12 S.W.3d 789, 795 (Tenn. 2000); *Bell v. Todd*, 206 S.W.3d 86, 93 (Tenn. Ct. App. 2005). Consequently, the trial court's decision may not be reversed since these alleged errors were not raised to the trial court. We will, however, discuss briefly the issue Dr. Holmes appears to raise about the defendants' familiarity with the applicable standard. It is generally recognized that "in most, if not all "jurisdictions in the United States an attorney "may be liable to his client for damages resulting from his failure to exercise [the] ordinary care, skill and diligence . . . which is commonly possessed and exercised by attorneys in practice in the jurisdiction." *Chapman v. Bearfield*, 207 S.W.3d 736, 739 (Tenn. 2006) (quoting *Spalding v. Davis*, 674 S.W.2d 710, 714 (Tenn. 1984)) (in which Tennessee

joined South Carolina in recognizing a statewide standard of professional care); *Smith*, 472 S.W.2d at 614. Consequently, in order to give an opinion on the standard of care, one must exhibit a familiarity with it. *See Chapman*, 207 S.W.3d at 739-40; *Smith*, 472 S.E.2d at 613-15. While not necessarily dispositive, it should also be noted that in this case defendants Mr. Bond and Mr. 7 Duncan have actually practiced law in South Carolina in association with local counsel.

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The affidavits at issue do not expressly state that affiants Bond and Duncan are familiar with South Carolina law. Regarding familiarity with the applicable standard of care, the affidavits state that Mr. Bond and Mr. Duncan both have years of complex trial experience and are "familiar with the standard of care for attorneys in cases such as *J. Doe v. Tenet Health Systems Medical, Inc., et al.*, CA 00-CP-10-1888, Charleston County

Court of Common Pleas."7 The trial court, without objection from plaintiff, found this to be sufficient. The reference to the court where the case was filed is sufficient to assert familiarity with the type of case and with the jurisdiction. Consequently, they were competent to present evidence to negate an essential element of the plaintiff's claim. Questions about the qualifications, admissibility, relevance, and competency of expert testimony are generally left to the sound discretion of the trial court. *McDaniel v. CSX Transportation*, 955 S.W.2d 257, 263 (Tenn. 1997); *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993). As this court found in *Pullum v. Robinette*, 174 S.W.3d at 134:

The trial court has broad discretion regarding the admission of expert testimony. *Robinson*, 83 S.W.3d at 725; *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002); *McDaniel*, 955 S.W.2d at 263. Consequently, a trial court's ruling on the admissibility of such evidence may be

overturned on appeal only if the discretion is exercised arbitrarily or is abused. *Stevens*, 78 S.W.3d at 832; *Seffernick v. St. Thomas Hospital*, 969 S.W.2d 391, 393 (Tenn. 1998); *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997). A finding of abuse of discretion is proper when the trial court applied an incorrect legal standard or reached a decision against logic or reasoning that caused an injustice to the party complaining. *Stevens*, 78 S.W.3d at 832; *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *Shuck*, 953 S.W.2d at 669. Accordingly, appellate courts will set aside a discretionary decision only where the trial court has misidentified, misconstrued, or misapplied the controlling legal principles, or the decision is contrary to the substantial weight of the evidence. *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for

that of the trial court, and an appellate court should allow the trial court's exercise of discretion to stand if reasonable judicial minds could differ as to its soundness. *Eldridge,* 42 S.W.3d at 85; *White*, 21 S.W.3d at 223. Given the applicable abuse of discretion standard, together with the plaintiffs' failure at the trial court level to take issue with defendants' familiarity about the standard or any perceived deficiencies with their affidavits, we will not reverse the trial court.

For the reasons stated herein, the grant of summary judgment is affirmed. The costs of this appeal are assessed to Dr. Cynthia Holmes for which execution may issue if necessary.

PATRICIA J. COTTRELL, P.J., M.S

Order Denying Petition for Rule 11 Review - Tennessee Supreme Court

September 28, 2009

ORDER

IN THE SUPREME COURT OF

TENNESSEE

J. DOE v. RICHARD L. DUNCAN, ET AL.

Appeal from the Circuit Court for Knox County

No. 3-586-05 Wheeler A. Rosenbalm, Judge

No. E2006-02506-COA-R3-CV

Upon consideration of the Tenn. R. App. P. 11 application for permission to appeal of the State of Tennessee and the record before us, the application is denied.

PER CURIAM

Filed 9/28/09.

ORDER DENYING MOTION FOR RECONSIDERATION TENNESSEE SUPREME COURT

October 20, 2009

IN THE SUPREME COURT OF TENNESSEE

J. DOE v. RICHARD L. DUNCAN, ET AL.

Appeal from the Circuit Court for Knox County

No. 3-586-05 Wheeler A. Rosenbalm, Judge

No. E2006-02506-COA-R3-CV - FILED SEPTEMBER 18, 2008

ORDER

On September 28, 2009, this Court denied the Rule 11 application filed by J. Doe. On October 7, 2009, J. Doe filed a petition for rehearing and moved for a stay of the mandate pending consideration of the motion. Upon due consideration of the petition and the record before us, the petition for rehearing and motion for stay are denied.

PER CURIAM

Filed October 20, 2009.